SUPREME COURT U. S.

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No. 507

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN J. PYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, John J. Pyne, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for travel in interstate commerce for the purpose of carrying on an unlawful business enterprise involving extortion, in violation of Title 18, United States Code, Section 1952, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. A, p. App. 1)

JURISDICTION

Judgment of the Court of Appeals was entered on July 12, 1968 (App. B, p. App. 14). A timely petition for rehearing and, alternatively, for rehearing en banc, was denied on August 14, 1968. (App. C, D, p. App. 15, 16). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTE INVOLVED

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * * "

STATEMENT OF THE CASE.

The petitioner, John J. Pyne, along with two co-defendants, was indicted in May of 1967 for interstate travel from Chicago, Illinois, to Provo, Utah, on or about March 9, 1964, to promote extortion in violation of a Utah statute (Title 76, Ch. 19, Sec. 19-1 of the Utah Code), in contravention of Section 1952, of Title 18, United States Code. One defendant pleaded guilty, and petitioner Pyne and a co-defendant were found guilty after a jury trial. On appeal to the United States Court of Appeals for the Seventh Circuit, the conviction was affirmed.

The Evidence in this case taken in a light most favorable to the Government is as follows:

On February 25, 1964, Robert P. Thorn, who was in the construction business in Provo, Utah, and lived in Salt Lake City, Utah, came to Chicago, Illinois, to attend the National Ready-Mix Concrete Association Convention (R. 20). On February 27, 1964, at approximately 10:30 P.M., as he left the Schubert Theater, he was approached by an individual whom he had never seen before and whom he identified as the defendant Schwartz. Schwartz told him that he was a manufacturer's representative of heavy equipment and wanted to talk to him about his product (R. 21). The two of them went to Thorn's room at the Palmer House Hotel.

In the room Schwartz asked Thorn whether he would like to have some fun and when Thorn asked what he meant by having some fun, Schwartz suggested that they go to bed (R. 22). Schwartz then exposed himself and suggested an act of perversion. Thorn told him to leave the room or else he would call the police.

Schwartz then told Thorn that if he caused any trouble he would be in serious trouble, and he pulled out a folder containing a badge and an I.D. card and told Thorn that he was an officer of the Chicago Police Department. Thorn gave him his driver's license and plastic folder containing business cards from which Schwartz took notes and then inquired about Thorn's family.

Schwartz also told Thorn that he would be charged on a homosexual offense if anything came of this experience.

The foregoing is the only evidence in the case pertaining to activities of the defendant Schwartz, except his arrest in Camden, New Jersey where he was identified by Thorn.

On March 9, 1964, an individual came into Thorn's office at Provo, Utah, and identified himself as Sgt. Walter Duncan of the Chicago Police Department and whom Thorn identified as the defendant Edmund Pacewicz (R. 22-23). Pacewicz left Thorn's office and returned in a few minutes with another man whom he introduced as Detective John Anderson of the Chicago Police Department and whom Thorn identified as the defendant Pyne. They told Thorn that they had a warrant of arrest for his return to Chicago as a result of the experience with Schwartz in his hotel room in

Chicago. Schwartz was referred to by Pyne and Pacewicz by the name of "Dick". Pacewicz said that Schwartz was in trouble because he had not arrested Thorn on that night and that the only way he could be cleared would be for Thorn to return to Chicago and stand trial on a homosexual charge. Thorn said it would be impossible for him to return to Chicago. Pacewicz then told Thorn that if he did not return to Chicago a bond in the amount of $25,000 would have to be posted. He was later told that the Bond could be reduced to $10,000, and Thorn said that he thought he could raise this amount (R. 24).

Thorn gave the $10,000 to Pacewicz and said that he gave it to him because he was afraid to return to Chicago accused by a Chicago policeman of a homosexual charge. He said he knew that it would be difficult to prove his innocence and if he were forced to return to Chicago, his reputation and life would be ruined (R. 26).

On March 11, 1964, Thorn received a telephone call from Pacewicz, the substance of which was to reassure him that things were under control in Chicago and progressing satisfactorily (R. 27). He also received a telephone call from Pyne on April 13, 1964, advising him that the case had been continued to July 9, and that everything would be straightened out by then (R. 29). The origin of the telephone call was not proven. Tape recordings of both of these telephone conversations were played to the jury over defense objections. All of the foregoing evidence was from the witness Thorn.

On cross-examination Thorn testified that he had been shown numerous photographs by agents of the F.B.I. in an effort to identify Schwartz (R. 23). Counsel for defendants requested that all photographs shown Thorn be turned over to counsel. However, the court directed that only the photographs identified by Thorn be turned over to counsel.

A Chicago police officer testified that he could find no records pertaining to an arrest warrant for Robert Paul Thorn (R. 38). Another officer stated that the records of the Chicago Police Department contained no records of a Sergeant Walter Duncan, and the only records pertaining to an Officer John Anderson were those of a Negro (R. 38).

An Avis Rent-A-Car clerk identified Pacewicz as the individual who signed a rental agreement on March 8, 1964, at the Salt Lake City Airport (R. 31). She also identified Pyne as being in the vicinity of the Avis counter at the time the agreement was signed (R. 32).

The defense presented no witnesses and their motions for judgment of acquittal were denied (R. 33).

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that an uncorroborated admission of a defendant to the Government's principal witness was sufficient, not only to sustain conviction, but also to prove "corpus delicti".

2. Did not the Court of Appeals err in holding that the burden of proving the most essential element of the offense, and in fact the "corpus delicti", to wit: interstate travel, shifted to the defendants, the Government once having shown by an uncorroborated admission that the defendants could have come from Chicago, Illinois, to Provo, Utah.

3. Did the Congress in enacting 18 U.S.C. 1952, intend that criminal prohibitions of the fifty States, without control by the Congress, exert a potential fluctuation criminal proscription on citizens of the various states in violation of the Sixth Amendment to the Constitution of the United States?

4. Did not the trial court err, in modifying the key defense instruction that the state offense could have been an offense other than extortion, by telling the jury that "you have to find" that the object of the interstate commerce "was extortion; not obtaining money under false pretentions or false impersonation of an officer or police official"?

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Seventh Circuit, that not only a conviction but proof of the corpus delicti can rest upon an uncorroborated admission by the petitioner to the principal Government witness, is contrary to the decision of this Court in *Wong Sun* v. *United States,* 371 U.S. 471.

2. The decision of the United States Court of Appeals for the Seventh Circuit that the burden of proof of the corpus delicti of the offense shifts to the defendant is contrary to this Court's decision in *Morrison* v. *California,* 291 U.S. 82, 88-91 and many other cases of other Circuits of the United States Courts of Appeals, that the burden of proof of an essential element of the crime never shifts.

3. Should not this Court exercise its power of supervision to examine the unconstitutional extension of federal jurisdiction over local matters which may not, consistent with the guarantees of the Constitution, be upheld. Stated otherwise, can a Federal Statute depend on the variant views of fifty States in their definition of local crime impose upon citizens of the several States fluctuating criminal proscriptions in their constitutional access to the channels of interstate commerce. (*Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U.S. 311; and *Cf. U. S.* v. *Nardello,* No. 51, October Term 1967 (36 U.S. Law Week 3483) probable jurisdiction noted and case placed on the summary calendar for October, 1968.

4. Should not this Court exercise its power of supervision where the lower courts have so far departed from the accepted and usual course of judicial proceedings by

sanctioning the modification of an instruction embodying the theory of the defense of the petitioner's request and thereby direct the jury to reject petitioner's defense in contravention of the Sixth Amendment to the Constitution of the United States.

1.

In order for this Court to understand one of the contentions of the petitioner, the following relates to the evidence (or lack of it) on interstate commerce. The Court of Appeals conceded, as it must, that there was no independent proof of travel from Chicago, Illinois, to Provo, Utah, on March 9, 1964. The interstate travel from Chicago to Provo, Utah, constituted the basis for venue in Chicago, Illinois, as well as the *corpus delicti* of the crime. This was a prosecution for *interstate travel* to promote the commission of Utah law, to wit, extortion. The *corpus delicti* is interstate travel. The only evidence that Pacewicz or Pyne came from Chicago, was by way of the uncorroborated testimony of the victim, Thorn, that the defendants *said* they were Chicago police officers who had come from Chicago and who were planning to return to Chicago. The evidence showed that Pacewicz and Pyne rented an Avis car at the Salt Lake City Airport. At that time, Pacewicz produced a New Jersey drivers license, correctly stating his residence and employer to be in the State of New Jersey.

There was no proof as to where Pyne came from. He was arrested in Chicago two years after the offense. Pacewicz and Schwartz were arrested in New Jersey. Everything that Pacewicz and Pyne told the victim, Thorn, in Utah was a falsehood. They falsely represented themselves to be Chicago police officers Duncan and Anderson; they falsely represented that a complaint had been filed; they falsely represented they had a warrant which had

been issued in Chicago; they falsely represented that Schwartz was in trouble as a young police officer who failed to report the hotel room incident; so that out of all this fabrication, their statement that they came from Chicago and had to return to Chicago was accepted by the lower courts as a basis for the laying of venue in Chicago, Illinois, and proof of the corpus delicti. The "admission" was accepted from the parcel of lies as truth and it was completely uncorroborated.

The foregoing is directly contrary to a decision of this Court in *Wong Sun* v. *United States,* 371 U.S. 471, as follows:

> "One line of our decisions establishes that criminal confessions and admissions of guilt require extrinsic corroboration; * * *
>
> "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. We observed in Smith v. United States, 348 U.S. 147, 153, 75 S.Ct. 194, 197, 99 L.Ed. 192, that the requirement of corroboration is rooted in 'a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.'" *Wong Sun* v. *United States,* 371 U.S. 471.

The decision of the case at bar is even contrary to the reviewing court's own holding:

> "A conviction cannot rest upon a confession unless it is corroborated by evidence establishing the *corpus delicti.* To this effect, defendants' counsel cite Forte v. U. S., 68 App.D.C. 111, 94 F.2d 236, 127 A.L.R. 1120, and the government cites Manning v. U. S., 10 Cir., 215 F.2d 945.

> "Most American courts take the view that the phrase '*corpus delicti*' includes first, the fact of an injury or a loss and secondly, the fact of somebody's criminality (in contrast *e.g.* to accident) as the cause of the injury or loss. The proof of these two elements involves the commission of a crime by somebody. But the phrase '*corpus delicti*' does not include the fact of the connection of the accused with the crime—his identity as the criminal, or the guilty agent through whom the wrong has occurred. Manning v. U. S., 215 F.2d 945, at page 947." *United States* v. *Echeles,* (C.A. 7) 222 F.2d 144.

The Ninth Circuit Court of Appeals has held as follows:

> "With reference to the second count, the charge is that the appellant falsely represented himself to be a citizen of the United States without having been duly admitted to citizenship, etc., in violation of 18 USCA Sec. 141. In order to establish this charge it is not only necessary for the prosecution to show that the appellant was not born in Camden, N.J., but also to show that he was not a citizen of the United States. There is no evidence to establish that fact other than the admissions of the appellant as hereinbefore stated. These were insufficient to prove the corpus delicti." *Duncan* v. *United States,* 68 F.2d 136.

2.

The reviewing Court, in addition to ruling contrary to longstanding authority establishing that criminal admissions require extrinsic corroboration and that a conviction must rest on firmer ground than an uncorroborated admission, went much further.

The Court of Appeals also shifted the burden of proof to the defendants. It so happened that by shifting the burden to the defendants, it placed upon them the burden of proof of venue, because without the interstate travel from

Chicago, Illinois, the Court had no jurisdiction. The Court of Appeals held as foliows:

> Much of what Pyne and Pacewicz told Thorn was false, to be sure, but there is nothing inherently incredible, even in retrospect, about these particular statements. In effect, defendants are asking that the admissions be disregarded because they were surrounded with lies. *Pyne and Pacewicz know the departure point of their Salt Lake City trip.* Therefore, there is nothing unfair about giving their admissions the same weight as those of less mendacious persons.
>
> From the foregoing evidence, the jury could conclude that Pacewicz and Pyne had come from Chicago on March 8. The Government at least *proved enough to shift the burden of proof to defendants. Morrison* v. *California,* 291 U.S. 82, 88-91. (Emphasis supplied)

The Government's initial burden is to present proof of every essential element of the crime charged. *United States* v. *Hoyland,* 7 Cir., 1959, 264 F.2d 346, certiorari denied 361 U.S. 845, 80 S.Ct. 98, 4 L.Ed.2d 83. The accused only carries the burden of going forward by proving facts which relate to him personally, especially when those facts are relied upon by him as justifying or excusing an otherwise criminal act. *McPhaul* v. *United States,* 1960, 364 U.S. 372, 379, 81 S.Ct. 138, 5 L.Ed.2d 136; *Taylor* v. *United States,* 8 Cir., 1927, 19 F.2d 813; *Williams* v. *United States,* 5 Cir., 1948, 170 F.2d 319, 322, certiorari denied 335 U.S. 909, 69 S.Ct. 412, 93 L.Ed. 442; *Jencks* v. *United States,* 5 Cir., 1955, 226 F.2d 540, reversed on other grounds 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 1103. The prosecution always has the burden of proving guilt beyond a reasonable doubt and this burden never shifts (*Leland* v. *State of Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, rehearing denied 344 U.S. 848, 73 S.Ct. 4, 97 L.Ed. 659; *United States* v.

Indian Trailer Corp., 7 Cir., 1955, 226 F.2d 595; *United States* v. *Fenwick*, 7 Cir., 1949, 177 F.2d 488; *United States* v. *Morley*, 7 Cir., 1938, 99 F.2d 683, certiorari denied 306 U.S. 631, 59 S.Ct. 463, 83 L.Ed. 1033; *Duncan* v. *United States*, 7 Cir., 1927, 23 F.2d 3).

The Court of Appeals for the Seventh Circuit relied upon *Morrison* v. *California*, 291 U.S. 82, 88-91, as authority for its holding. As respects the shift of the burden of going forward in a criminal prosecution to the defendant (*Morrison* v. *California*, 291 U.S. 82, 88, 90-91, 54 S.Ct. 281, 284, 285), Mr. Justice Cardozo said, by way of dictum, "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance * * * or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge * * *." Id., 291 U.S. 90-91, 54 S.Ct. 285. Whatever may be the reach of that dictum, it was not adequate to sustain a conviction in that case and is inadequate here. That case involved a charge of conspiracy to violate the alien land law of California. A citizen, charged as co-conspirator, was convicted on a presumption that he knew of the disqualification of his co-conspirator alleged to be an alien. The holding of the Court was that invocation of the presumption against the citizen denied him due process. Id., 291 U.S. 93, 54 S.Ct. 286. The alien was not a conspirator, "however guilty his own state of mind," unless the citizen "shared in the guilty knowledge and design." Therefore, said Mr. Justice Cardozo, "The joinder was something to be proved, for it was of the essence of the crime." Id., 291 U.S. 93, 54 S.Ct. 286. That ruling rests on the presumption of innocence that is never overcome unless the prosecution introduces some competent evidence implicating the accused in the criminal act that is charged.

The Court of Appeals below relied on *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311. A reading of the *Clark Distilling Co.* case discloses that the Congress there was dealing with intoxicating liquors and the various laws of the States which had adopted restrictions on their shipment. The Supreme Court pointed out that the Congress had authority directly to pass laws relating to intoxicating liquors and that a lesser exercise of power under the Webb-Kenyon Law, which was under consideration in that opinion, did not make unconstitutional a law over a subject to which a far greater control could have been applied.

The Court in its opinion recognized that the subject, itself, was a justification for the lesser exertion of legislation. The Court did point out, however, at page 332 as follows:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that *such power may be constitutionally extended to things which it may not*, consistently with the guaranties of the Constitution, *embrace.*" *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311. (Our emphasis)

The "exceptional nature" of the subject in the *Clark* case cannot be equated with local offenses (in the case at

bar—extortion), which constitutionally are reserved to the State. The inescapable argument still remains that the criminal prohibitions of the fifty states without processes of repeal or amendment or any other control by the Congress, exerts a potential fluctuating criminal proscription that the Congress in enacting the statute never thought of and could never have anticipated.

This Court should exercise its power of supervision to decide an important question of federal law which has not been, but should be, settled by this Court.

4.

The Petitioner below had attacked the constitutionality of Section 1952, Title 18, United States Code, on the ground that the criminal prohibitions of the fifty states, without processes of appeal or amendment by the Congress, exerts a potential fluctuating criminal proscription that the Congress, in enacting the statute, never thought of nor can control. In the case at bar, the trial court took judicial notice of the laws of the State of Utah. Extortion under the Utah code, Chapter 19, Section 19-1 of Title 76, is in relevant part:

> "Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear." (R. 57)

The trial court also instructed the jury based on the Utah statutes as follows:

> "Another statute which defines fear such as will constitute extortion is fear which can be induced by a threat to accuse a person or any relative of his or any members of his family with any crime. That is a permissible fear for purposes of extortion. (R. 58)."

The petitioner, in his defense, arguably demonstrated that the facts in the case at bar could give rise to a violation of another statute. The defendant, under his theory of the case, tendered Pyne Instruction V, reading as follows:

> "There is a statute in the State of Utah which defines extortion as the obtaining of property from another with his consent induced by a wrongful use of force or fear * * * There is another statute which defines fear such as will constitute extortion can be induced by a threat to accuse a person or any relative of his or member of his family with any crime. There is also a statute in the State of Utah which defines obtaining money by false pretense. It is as follows: Every person who knowingly and designedly, by false or fraudulent representations or pretenses obtains from any other person any * * * money * * *, with intent to cheat or defraud any person of the same * * * is punishable, etc.
>
> It is also an offense in the State of Utah to impersonate an officer and thereby in such pretended character obtain any money.
>
> If you find from the evidence that the defendants did not commit the crime of extortion but rather the crime or crimes involving false pretenses or false personation, then you must find the defendants not guilty. In other words, ladies and gentlemen, in addition to the element of interstate travel with specific intent, the element of extortion must be proven beyond a reasonable doubt. If you have a reasonable doubt as to whether or not extortion was committed, then you must find the defendants not guilty."

The trial court in adapting the request, and charging the jury stated as follows: (App. 59)

> "You *have to find* from the evidence that the object or purpose of the interstate commerce, if you find there was such interstate commerce, interstate

transportation, was extortion; not obtaining money under false pretenses or false impersonation of an officer or public official.

"I made it clear to you that that is an essential element of extortion as distinguished—and Mr. Calihan argued it vigorously—that extortion as distinguished from obtaining money under false pretenses or obtaining money by false impersonation of an officer is an essential element of this case, and it is." (Emphasis added)

Proper objection was made to the modification of this instruction.

"Mr. Calihan: Your Honor said it in this fashion, that it was not charged here, and then you said but you are going to have to find them guilty of extortion. I don't know if that was a command." (Tr. 535-536)

Thus the Court directed the jury to find extortion in the following words:

"You *have to find* from the evidence that the object or purpose of the interstate commerce • • • was extortion; not obtaining money under false pretenses or false impersonation of an officer or public official." (Emphasis added)

The Court then went on to say:

"I made it clear to you that that is an essential element of extortion as distinguished • • • from obtaining money under false pretenses."

The instruction *as tendered* stated that if the jury found that the defendants did not commit the crime of extortion but rather the crime or crimes involving false pretenses or false impersonations, then the jury must find the defendants not guilty. The issue was squarely pre-

sented to the jury in this instruction that if they had a reasonable doubt as to whether or not extortion was committed then they must find the defendants not guilty.

It should be made clear that what the petitioner raised as error below was the portion of the instruction where the District Judge modified Pyne Instruction V. The first paragraph of that instruction was given as tendered (R. 58-59). It was only the last paragraph of said instruction which was modified to the extent that it could be interpreted as a command to the jury. Proper objection was made pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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